

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

RANDY McKAY,

Defendant-Appellant.

UNPUBLISHED

March 18, 2003

No. 238206

Wayne Circuit Court

LC No. 01-002530

Before: Griffin, P.J., and Neff and Gage, JJ.

MEMORANDUM.

Defendant appeals as of right his conviction and sentence for possession of less than 25 grams of a controlled substance (cocaine), MCL 333.7403(1) and MCL 333.7403(2)(a)(v). His conviction was entered on August 29, 2001 after a bench trial.¹ We affirm. This case is being decided without oral argument pursuant to MCR 7.214(A) and (E).

Defendant first argues that his conviction was against the great weight of the evidence.² Because defendant failed to preserve this issue for appeal by timely moving for a new trial below, we may properly decline to address it. MCR 2.611(A)(1)(e); *People v Winters*, 225 Mich App 718, 729; 571 NW2d 764 (1997). However, in any event, we find that a new trial is not warranted.

Generally, in reviewing a motion for a new trial on the ground that the verdict was against the great weight of the evidence, “[t]he test is whether the evidence preponderates so heavily against the verdict that it would be a miscarriage of justice to allow the verdict to stand.” *People v McCray*, 245 Mich App 631, 637; 630 NW2d 633 (2001). “Conflicting testimony, even when impeached to some extent, is an insufficient ground for granting a new trial.” *People*

¹ Defendant was acquitted of a second charge of delivery of a controlled substance arising from the same transaction.

² We note that defendant discusses this issue in terms of both sufficiency of the evidence and the great weight of the evidence, but the thrust of his argument is the latter. The prosecution’s brief apparently discussed the issue in the context of a breaking and entering offense, apparently referring to a different case in error.

v Lemmon, 456 Mich 625, 647; 576 NW2d 129 (1998). New trial motions that are based solely on the weight of the evidence regarding witness credibility are not favored and should be granted only with great caution and in exceptional circumstances. *Id.* at 639, n 17.

Here, although defendant notes discrepancies in the testimony of the officers who participated in the earlier cocaine purchase, such as their descriptions of his clothing, his amputation, the type of baggie given to the first group of officers, and the direction the two drove after the sale, he does not discuss the testimony of the officers who participated in his arrest. It is this testimony, and the second baggie of cocaine found on defendant at that time, that led to defendant's conviction for possession. Defendant has failed to show that the trial court's decision to credit the testimony of these officers was erroneous. We thus affirm defendant's conviction.

Defendant next argues that the trial court's decision to sentence him to a one to four year term of imprisonment should be reversed because the guidelines scoring for his offense resulted in a recommended sentence of zero to eleven months in prison and the trial court failed to articulate substantial and compelling reasons for the departure. See MCL 769.34(3). However, according to the Michigan Offender Tracking Information System (OTIS) we note that defendant has fully served his minimum sentence and was placed on parole on August 28, 2002. Accordingly, defendant's sentencing challenge has been rendered moot. *People v Rutherford*, 208 Mich App 198, 204; 526 NW2d 620 (1994). We thus decline to review this issue.

Affirmed.

/s/ Richard Allen Griffin
/s/ Janet T. Neff
/s/ Hilda R. Gage